76-5231

No.

Supreme Court, U. S.
FILED
OCT 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *Petitioner,*

v.

L. GENE ALLARD, *Respondent.*

Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division Two

---

TOBIAS C. TOLZMANN
5564 Kawaikui Street
Honolulu, Hawaii 96821
Counsel for Petitioner

JOE THRASHER
Attorney

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional provisions involved	3
Statement of the case	3
Argument:	
I. By holding that the First Amendment does not preclude use of evidence and argument concerning a Church's religious tenets to impeach its witnesses and impugn its motives in a civil action against it for malicious prosecution, the state court has decided a federal question of substance not heretofore determined by this Court	12
II. The practical effect of the state court's allowance of evidence and argument concerning a Church's tenets to impeach its witnesses and impugn its motives was to enable the trier of fact to interpret the Church's doctrine. This is at odds with a long line of analogous decisions by this Court	16
Conclusion	18
Appendix A: Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two	1a
Appendix B: Notice of Order of the Supreme Court of the State of California denying hearing	16a
Appendix C: Exhibit 1, HCO Policy Letter of October 18, 1967	17a
Appendix D: Extracts from arguments of counsel in the trial court	18a

Page

Appendix E: Declaration of Eual R. Harrow 25a

Appendix F: Extracts from petitioner's opening and reply briefs in state intermediate court of appeal and petition to state supreme court 27a

CITATIONS

Cases:

Allard v. Church of Scientology of California, 58 Cal. App.3d 439, 129 Cal.Rptr. 797 (1976) 1
Casey v. Roman Catholic Archbishop, 217 Md. 595, 143 A.2d 627, 72 A.L.R.2d 893 (1958) 15
Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C.Cir. 1969) 13
Gonzales v. Archbishop, 280 U.S. 1 17
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 .....13, 17
Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 ....13, 17
Ogodziski v. Gara, 173 Wis. 371, 181 N.W. 277 (1921) 12
People v. Simon, 80 Cal.App. 675, 252 P. 758 (1927) .. 12
Presbyterian Church v. Hull Church, 393 U.S. 440 ..13, 17
Rudolph v. Landwerlen, 92 Ind. 34 (1883) 12
Serbian Eastern Orthodox Diocese v. Milivojevich, ... U.S. ...., 96 S.Ct. 2372, 44 U.S.L. Week 4928 (June 21, 1976) 17
Sherbert v. Verner, 374 U.S. 398 12
Skuy v. United States, 261 Fed. 316 (8th Cir. 1919) .. 12
United States v. Ballard, 322 U.S. 78 .....12, 13, 16
Watson v. Jones, 13 Wall. 679 17
Wisconsin v. Yoder, 406 U.S. 205 12

Statutes and Rules:

California Rules of Court, Rules 24(a) and 28 (b) .. 2

28 U.S.C. § 1257(3) 2

Miscellaneous:

Holy Bible

I Corinthians 5:5 .....15, 17

Exodus 1:15-20 14

Matthew 15:4 .....15, 17

IN THE

Supreme Court of the United States

October Term, 1976

No.

Church of Scientology of California, *Petitioner,*

v.

L. Gene Allard, *Respondent.*

Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division Two

---

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is officially reported at 58 Cal.App.3d 439, and unofficially reported at 129 Cal.Rptr. 797. The full text of such opinion is appended hereto in accordance with Rule 23(1)(a) and (i).

JURISDICTION

Judgment on a jury verdict adverse to petitioner was entered by the Superior Court of the State of California for the County of Los Angeles on June 3, 1974. Decision modifying but otherwise affirming such judgment on appeal was filed in the Court of Appeal of the State of California, Second Appellate District, Division Two, on May 18, 1976 (see Appendix A). Timely petition for discretionary hearing in the Supreme Court of the State of California (see Rules 24(a) and 28(b), California Rules of Court) was filed on June 28, 1976, and denied by minute order entered July 15, 1976 (see Appendix B). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

In a civil tort action for malicious prosecution, may a state court, without violating a defendant corporate Church's right to the free exercise of religion under the First and Fourteenth Amendments, receive evidence and permit a jury to entertain argument concerning the Church's religious tenets as bearing upon the motivation and credibility of individual actors and witnesses shown to have espoused the Church's teachings at one time or another, and thereupon sustain a jury verdict holding the Church vicariously liable on the premise that the jury might properly have concluded from the Church's doctrine (as interpreted by the jury) that all persons at any time subject to the influence thereof are for that reason liars and malefactors?

The court below answered this question in the affirmative, flatly ruling that the jury impliedly and justifiably found that "those witnesses who were Scientologists or had been Scientologists were following the policy of the Church and lying to, suing and attempting to destroy respondent" (App. A, p. 6a), and that any corporate religious body "whose tenets include lying and cheating in order to attack its 'enemies' deserves the results of the risk which such conduct entails" (App. A, p. 13a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

United States Constitution, Fourteenth Amendment:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The action below was one for the civil tort of malicious prosecution under state law. Curiously, however, it was prosecuted not against the individuals said to have wrongfully accused respondent, but against the petitioning corporate Church itself, on an apparent theory of *respondeat superior,* or otherwise, that the Church's doctrinal tenets tended to encourage that sort of thing and that it should, therefore, be held vicariously liable for the conduct of any who may have been influenced thereby.[1]

---

[1] The original complaint, filed October 19, 1970, named as individual defendants one L. Ron Hubbard, the founder of the religious

For purposes of this petition, the facts, sharply conflicting at trial, may be taken as given by the state court of appeal, briefly as follows:

Respondent, L. Gene Allard, a one-time adherent and staff member of the Church, became disenchanted in May or June of 1969. Shortly before or after midnight on June 7 or 8, 1969, he entered a Church office and removed several documents belonging to the Church from a safe, the combination of which was known only to himself and another Church staff member, one Alan Boughton. He denied having stolen at the same time certain currency and traveler's checks said to have been in the safe. Confronted with evidence of his endorsement on some of the traveler's checks in question, he admitted having handled the same, but maintained, to the apparent satisfaction of the jury and the courts below, that he deposited the checks in an unidentified "open" account in the name of the Church. Be that as it may, having "borrowed" his roommate's car he repaired in the early morning hours of June 8, 1969 to the Los Angeles airport, from whence he flew to Kansas City, where he turned over the admittedly purloined Church documents to the Internal Revenue Service (App. A, pp. 8, 9).

The following day, the same Alan Boughton reported the foregoing, and the alleged fact that some $23,000 in currency was missing from the safe, to the Los

---

faith practiced by the Church, Alan Boughton, who actually reported respondent's suspected criminal activity to the Los Angeles Police Department, an Ira Chalef and "Does I to X." See Clerk's Transcript, p. 1 (hereinafter "C.T."). For reasons not apparent of record, however, none of the individually named defendants, including the said Boughton, who testified as a witness at the trial, was ever served with process, and the case proceeded against the Church itself and alone.

Angeles Police Department, as a result of which Allard was arrested in Florida on a charge of grand theft. He waived extradition and returned to California, where upon a finding of probable cause by a magistrate at a preliminary hearing for that purpose he spent 21 days in jail. Eventually, however, that charge was dismissed "in the interests of justice," upon the recommendation of a deputy district attorney, who testified outside the presence of the jury that witnesses who were "members of the Church were evasive in answering his questions." (App. A, p. 3a). Allard's state civil action for malicious prosecution against the Church ensued.

At the outset, Allard's trial counsel made it known at pre-trial conferences that he intended to rely at trial upon evidence and argument concerning the Church's "reprehensible" tenets, as interpreted by Allard, as supplying the element of malice or motive in the case. Over objection by the Church, the trial court preliminarily announced that it would permit consideration of Church doctrine for this purpose. While these pre-trial conferences were not stenographically recorded as such, the trial court acknowledged for the record that it had so ruled preliminarily in denying a motion for mistrial based on references in Allard's opening statement to doctrines of the Church:

> "THE COURT: The motion is denied, counsel. There was no objection whatsoever made to plaintiff's opening statement, and my recollection is that I told you yesterday that, off the top of my head, that it was my feeling that most of these matters would go to the question of motive, which goes to the question of malice.
>
> "* * *

> "MR. O'REILLY: Your Honor, in all fairness, I will tell you that Mr. Allard is going to testify as to the Church's policy on fair game. He went through the rigid training course in the area of Scientology policy.
>
> "THE COURT: This would not be relevant except insofar as it may go to the one relevant or necessary issue, to wit, motive." (Reporters' Transcript, pp. 112-13, hereinafter "R.T.")

And so it was. Much of the trial was given over to testimony by Allard concerning his inflammatory interpretations of Church doctrine, and even more inflammatory argument to the jury by his trial counsel on that subject. The latter included a statement to the jury that, "Now, according to the evidence, and according to your duties as jurors, you should treat the defendant for what it is, a big thriving business run by a mad man" (R.T. 711). Counsel was permitted to argue, moreover, that among the policies of the Church was one "entitled, 'Fair Game,' the Church of Scientology fair game law," by which, the jury was told, Allard was ecclesiastically defined as a "suppressive person . . . an enemy of the Church of Scientology," who for that reason by ecclesiastical law" should be cheated, lied to, deceived. Lawsuits should be filed against this suppressive person. This suppressive person should be, it is stated, destroyed." (R.T. 87). The springboard for this was an obscure writing by the founder of the Scientology faith, which was received in evidence over the Church's objection as Exhibit 1 (R.T. 216-25, 643). The full text of the writing appears as Appendix C hereto. Counsel was permitted to promise the jury that "other policies, equally as despicable, will be introduced into evidence pertaining to their practices"

(R.T. 87). Indeed, counsel was permitted to argue in closing that:

> ". . . . This is not a holy war against Scientology for calling itself a church; for receiving these funds for this auditing procedure involving the tin cans—
>
> "* * *
>
> ". . . . This is to bring them to justice for abiding by the policy of fair game, promulgated by the madman of the Mediterranean, the fanatic from Flag. This is a policy to bring them to justice; a procedure to bring them to justice for promulgating and following this policy.
>
> "* * *
>
> "And this document, plaintiff's No. 1, is in evidence and it will be in the jury room for you to look at.
>
> "Now, . . . it's this policy that's on trial in this lawsuit. . . ." (R.T. 653-54).

In a word, it was made clear that the proceeding below was essentially a heresy inquiry, the central issue in which was the relative palatability of the defendant Church's literature. The full text of some of the more colorful passages of counsel's argument to the jury, including the trial court's occasional and manifestly ineffective admonitions to the jury in that connection, is set forth in Appendix D hereto.

The Church's inevitable motion for mistrial at the conclusion of the case was denied by the trial court, noting in so doing that, "I don't frankly think that some of the remarks were not unreasonable inferences to draw from the evidence" (R.T. 721). The jury responded by returning a verdict against the Church in the amount of $50,000 compensatory damages and $250,000 punitive damages (R.T. 727, C.T. 224), and

judgment was entered accordingly (C.T. 228-30). That the jury understood the trial to have been one of the religious doctrine of the Church was made clear by statements of the jurors themselves, one of whom, for example, volunteered after the trial, pursuant to express authorization by the trial court to freely discuss the matter (R.T. 732), that:

> ". . . he was very much against the CHURCH OF SCIENTOLOGY and their doctrines, and stated that for 200 years, this country had struggled to make everyone equal and that the doctrine of the CHURCH was a huge step backwards. He further advised after the trial, that several of the jurors contemplated on asking for protection, since they felt something might happen to them, due to the doctrines of the CHURCH OF SCIENTOLOGY." (C.T. 329).

The full text of the declaration of an independent investigator who interviewed the jurors after trial is set forth in Appendix E hereto.

It must be conceded, nevertheless, that trial of the matter on behalf of the Church was characterized by undue timidity, if not ineptitude, on the part of its counsel, in that the federal question sought to be reviewed hereby was either not pointedly raised during the course of trial below, or was lost in unrecorded colloquy in chambers.[2] It was not until assignment of

[2] The introduction into evidence of the foregoing noted writing of the founder of the Church's faith (Exhibit 1), for example, is reported only as follows:

> "(A conference was had between court and counsel in chambers which was not reported.)
>
> "(The following proceedings were had in open court out of the presence of the jury:)
>
> "THE COURT: As a result of a conference in chambers, plaintiff's 1 is admitted in evidence." (R.T. 643).

error in briefs to the state appellate courts that the question presented here was pointedly raised below. Pertinent quotations from petitioner's opening and reply briefs in the state intermediate court of appeal and from its petition for hearing to the state supreme court are set forth in Appendix F. The state court of appeal, however, fully accepted and considered that among petitioner's principal contentions on appeal were that "to allow a judgment thereby achieved to stand would constitute a violation of appellant's free exercise of religion" (App. A, p. 3a-4a), and that "the trial became one of determining the validity of a religion rather than the commission of a tort" (App. A, p. 6a). The state court of appeal advisedly determined that "the procedure and verdict below does not constitute a violation of appellant's First Amendment free exercise of religion" (App. A, p. 6a).

While the trial court in the first instance justified consideration of evidence and argument concerning religious doctrine on the theory that the same was relevant to the issue of motive or malice, the state court of appeal affirmed on yet a different theory, namely, that of "credibility," saying that:

> "The principal issue in this trial was one of credibility. If one believed defendant's witnesses, then there was indeed conversion by respondent. However, the opposite result, that reached by the jury, would naturally follow if one believed the evidence introduced by respondent. Appellant repeatedly argues that the introduction of the policy statements of the Church was prejudicial error. However, those policy statements went directly to the issue of credibility. Scientologists were allowed to trick, sue, lie to, or destroy 'enemies.' (Exhibit 1.) If, as he claims, respondent was considered to

be an enemy, that policy was indeed relevant to the issues of this case. That evidence well supports the jury's implied conclusion that respondent had not taken the property of the Church, that he had merely attempted to leave the Church with the documents for the Internal Revenue Service, and that those witnesses who were Scientologists or had been Scientologists were following the policy of the Church and lying to, suing and attempting to destroy respondent. Evidence of such policy statements were damaging to appellant, but they were entirely relevant. They were not prejudical. A party whose reprehensible acts are the cause of harm to another and the reason for the lawsuit by the other cannot be heard to complain that its conduct is so bad that it should not be disclosed. The relevance of appellant's conduct far outweighs any claimed prejudice.

"We find the introduction of evidence of the policy statements and other peripheral mention of practices of the Church of Scientology not to be error. In the few instances where mention of religious practices may have been slightly less germane than the policy statements regarding fair game, they were nonetheless relevant and there was no prejudice to appellant by the introduction of such evidence." (App. A, pp. 6a-7a).

Pursuing the notion that all Scientologists, past and present, could properly be regarded as liars by reason of their religious beliefs, the court of appeal disregarded a magisterial finding of probable cause for Allard's criminal prosecution on the premise that "if the evidence showed that the agents and employees of appellant were lying, then the preliminary hearing at which they also testified would not be valid" (App. A, p. 15a, n. 9). Similarly, the recommendation of a deputy district attorney that criminal charges against

Allard be dismissed "in the interests of justice" was approved because "the prospective witnesses for the Church of Scientology were considered to be evasive" (App. A, p. 3a). It was said that "several of counsel's individual statements and questions were inappropriate," but that on the whole the biting religious argument which produced the verdict was not prejudicial (App. A, p. 5a).

Concluding that "any party whose [religious] tenets include lying and cheating in order to attack its 'enemies' deserves the results of the risk which such conduct entails," the court of appeal did, nevertheless, reduce the punitive award from $250,000 to $50,000 on the premise that "this conduct may have so enraged the jury that the award of punitive damages may have been more the result of feelings of animosity, rather than a dispassionate determination of an amount necessary to assess defendant in order to deter it from similar conduct in the future" (App. A, p. 13a). The court of appeal did not undertake to explain how evidence and passionate argument concerning religious doctrine could taint the punitive damage award to the extent of 4/5, while leaving the rest of the findings and judgment uninfected. The Supreme Court of the State of California declined discretionary review without opinion (App. B).

ARGUMENT

I. By Holding That the First Amendment Does Not Preclude Use of Evidence and Argument Concerning a Church's Religious Tenets to Impeach Its Witnesses and Impugn Its Motives In a Civil Action Against It for Malicious Prosecution, the State Court Has Decided a Federal Question of Substance Not Heretofore Determined by This Court.

It is recognized that while the freedom to preach or believe any religious tenet, however apparently bizarre, is constitutionally absolute, freedom to act, however religiously inspired, is not. *Wisconsin* v. *Yoder,* 406 U.S. 205; *Sherbert* v. *Verner,* 374 U.S. 398. This is not, however, a case in which a defendant effectively admits indulgence in ostensibly wrongful conduct, but pleads that "the Lord made him do it" or otherwise claims First Amendment privilege for the act. *Cf. United States* v. *Ballard,* 322 U.S. 78. On the contrary, it is a case in which a defending Church hotly denies any wrongdoing, and the *plaintiff* was permitted, over the Church's objection, to resort to interpretation of Church doctrine to impugn its motives and impeach its witnesses. In this sense, the case is apparently unprecedented.

For many years courts have condemned even passing allusions to the religious beliefs of parties or witnesses as bearing upon their credibility or propensities, not as a matter of constitutional law under the First Amendment as such, but as a matter of general principle. *Rudolph* v. *Landwerlen,* 92 Ind. 34 (1883); *Skuy* v. *United States,* 261 Fed. 316 (8th Cir. 1919); *Ogodziski* v. *Gara,* 173 Wis. 371, 181 N.W. 277 (1921); *People* v. *Simon,* 80 Cal.App. 675, 252 P. 758 (1927). Diligent search by counsel, however, has revealed no case in which this or any other court has advisedly

determined that a litigant either may or may not, consistent with the First Amendment, offer evidence and indulge in argument concerning the religious beliefs of his opponent or his opponent's witnesses as bearing on their credibility or propensities. It is respectfully submitted that this case presents occasion for announcement that the First Amendment precludes religious debate in American courtrooms, and that people, including corporate churches,[3] should be tried by what they objectively do and not by what they arguably believe.

The rhetoric of the Church here, as witness Exhibit 1 itself (App. C), may to some appear strange or harsh, and its tenets, not to mention its very name, may to many seem obnoxious. This is not to say, however, that the Church or its writings are for that reason any the less entitled to the protection of the First Amendment. *Cf. Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C.Cir. 1969). On the contrary, it is precisely the unorthodoxy of the Church which calls for First Amendment protection. The Free Exercise Clause was self-evidently erected not for the benefit of popularly accepted orthodox religious faiths, which have no real need for specific legal protection, but to safeguard the rights of minority believers in possibly unpopular religious views. There was no determination below, or basis therefor, that the Church here is anything other than a bona fide religious organization entitled to the protection of the First Amendment as such.

---

[3] The Free Exercise Clause of the First Amendment, of course, protects not only individuals, but organized churches themselves. *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94; *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190; *Presbyterian Church* v. *Hull Church,* 393 U.S. 440.

The decision below would open the door to impeachment on religious grounds of all parties and witnesses, save possibly the staunchest of atheists, and expose every church imaginable to vicarious liability for the acts of its adherents. The Holy Bible, which as noted by Mr. Justice Jackson dissenting in *United States* v. *Ballard,* 322 U.S. at 87, is taken as gospel by many, for example, can be opened almost at random to provide illustrations of how that particular document could provide evidentiary springboard for argument impeaching Christian or Jewish witnesses or mulcting Christian or Jewish organizations in damages for actively promoting reverence of one part or another of that document.

A litigant unrestrained by the First Amendment could under the reasoning of the opinion below easily introduce Exodus 1:15-20 into evidence and argue therefrom that all Christian and Jewish witnesses against him are authorized and encouraged by religious policy which they revere to lie when it suits their purpose.[4] Again, assume that a person claiming to

[4] Exodus 1:15-20 contains the following rhetoric:

"15. And the king of Egypt spake to the Hebrew midwives, of which the name of one was Siphrah, and the name of the other Puah.

"16. And he said, When ye do the office of a midwife to the Hebrew women, and see them upon the stools: if it be a son, then ye shall kill him: but if it be a daughter, then she shall live.

"17. But the midwives feared God, and did not as the king of Egypt commanded them, but saved the men children alive.

"18. And the king of Egypt called for the midwives, and said unto them, Why have ye done this thing, and have saved the men children alive?

"19. And the midwives said unto Pharaoh, Because the Hebrew women are not as the Egyptian women; for they are lively, and are delivered ere the midwives come in unto them.

have fallen from favor of the Roman Catholic Church also falls down the steps of the Church's premises on her way out, a not improbable occurrence. *Cf. Casey* v. *Roman Catholic Archbishop,* 217 Md. 595, 143 A.2d 627, 72 A.L.R.2d 893 (1958). Her attorney, unrestrained by the First Amendment, could argue in a suit for damages for personal injury against the Church that agents or adherents of the Church pushed her in pursuit of the policy of I Corinthians 5:5 "to deliver such an one unto Satan for the destruction of the flesh." If the victim of a homicide were shown to have called his father or mother a bad name, a Christian defendant, not to mention his Church as abettor, would be vulnerable to argument that he and it were motivated by the policy of Matthew 15:4 that "whoever curses father or mother shall be put to death." Further examples from the Holy Bible, the Koran or other recognized religious literature could be multiplied a thousandfold.

As a practical matter, of course, considering that the Holy Bible is popularly recognized as sacred by, among others, the vast majority of potential jurors and judges, no lawyer in his right mind is likely to attempt evidentiary or argumentative use of that document in ways hypothesized above. The Church of Scientology, and its writings, however, do not enjoy the practical protection of popularity, and hence must seek refuge in the First Amendment.

"20. Therefore God dealt well with the midwives: and the people multiplied, and waxed very mighty."

II. The Practical Effect of the State Court's Allowance of Evidence and Argument Concerning a Church's Tenets to Impeach Its Witnesses and Impugn Its Motives Was to Enable the Trier of Fact to Interpret the Church's Doctrine. This Is at Odds With a Long Line of Analogous Decisions by This Court.

The absurdity of the examples of potential evidentiary and argumentative use of the Holy Bible suggested above, of course, flows from the obvious fact that those who revere that document do not necessarily take everything recited therein literally, and that it is unseemly at best for civil judges or jurors to speculate otherwise. Mr. Justice Jackson, dissenting in *United States* v. *Ballard,* 322 U.S. 78, 94, put it well when he said:

> ". . . Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how far it is reliance upon a teacher's literal belief which induces followers [to act in one way or another]."

By the same token, the vice of the decision below is that it effectively permitted a civil jury to construe an obscure writing of the founder of Scientology as literally meaning that apostates of the Church should in a strict secular sense in fact be "tricked, sued or lied to or destroyed," and to find, moreover, that such tenet, so interpreted by the jury, was so central to the Scientology faith as to enable conclusion that all Scientologists, past or present, are for that reason categorical liars and persons spiritually disposed to malicious prosecution of those who stray from the fold. The

Church omitted below, and it would not be profitable here, to indulge in theological explanation that the symbolism of its rhetoric no more requires perjury and malicious suit by its adherents than do I Corinthians 5:5 and Matthew 15:4 require Christians to be murderers. Suffice it to say that for more than a century this Court has regularly and repeatedly held, albeit in different contexts, that the First and Fourteenth Amendments preclude civil judges and jurors from undertaking theological interpretation. *Watson* v. *Jones,* 13 Wall. 679; *Gonzales* v. *Archbishop,* 280 U.S. 1; *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94; *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190; *Presbyterian Church* v. *Hull Church,* 393 U.S. 440; *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* —— U.S. ——, 96 S.Ct. 2372, 44 U.S.L.Week 4928 (June 21, 1976).

As early noted in *Watson* v. *Jones,* each church "has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collection of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with," but that "the laws knows no heresy." 13 Wall. at 729. Here, ever so much as in *Presbyterian Church* v. *Hull Church,* the trier of fact undertook first to determine that it truly *was* a matter of church doctrine to harass dissidents, and second that such belief was so central to the religion that present and even past adherents are predisposed to commit perjury and maliciously prosecute former brethren. Such a judicial undertaking required "the civil court to determine matters at the very core of a religion—the interpretation of particular church

doctrine and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." 393 U.S. at 450.

CONCLUSION

The petitioning Church represents that the decision below is injuring it, not alone by its money burden, but because its official and widespread publication is being relied upon by others, including governmental agencies, as legal sanction for *ipso facto* distrust of it and its adherents. The Church is fully prepared to defend at trial against any claims of wrongdoing based on proof of objective fact. It is not prepared, and submits that under the First Amendment it may not be required, to justify or explain in so doing the mysteries of its religious tenets to the uncertain satisfaction of a civil trier of fact. For these and the foregoing reasons, the petitioner respectfully prays that this Court issue its writ of certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two, and upon review reverse the judgment below and order a new trial untainted by improper religious considerations.

Respectfully submitted,

TOBIAS C. TOLZMANN
5564 Kawaikui Street
Honolulu, Hawaii 96821
Counsel for Petitioner

JOE THRASHER
Attorney

October 1976

APPENDIX

APPENDIX A

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2d Civil No. 45562
(L.A.S.C. No. 988151)

L. GENE ALLARD, *Plaintiff, Cross-Defendant and Respondent,*

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *Defendant, Cross-Complainant and Appellant.*

(filed May 18, 1976)

L. Gene Allard sued the Church of Scientology for malicious prosecution. Defendant cross-complained for conversion. A jury verdict and judgment were entered for Allard on the complaint for $50,000 in compensatory damages and $250,000 in punitive damages. Judgment was entered for Allard and against the Church of Scientology on the cross-complaint. Defendant-cross complainant appeals from the judgment.

FACTS:

The evidence in the instant case is very conflicting. We relate those facts supporting the successful party and disregard the contrary showing. (*Nestle* v. *City of Santa Monica,* 6 Cal.3d 920, 925-926.)

In March 1969, L. Gene Allard became involved with the Church of Scientology in Texas. He joined Sea Org in Los Angeles and was sent to San Diego for training. While there, he signed a billion-year contract agreeing to

do anything to help Scientology and to help clear the planet of the "reactive people." During this period he learned about written policy directives that were the "policy" of the Church, emanating from L. Ron Hubbard, the founder of the Church of Scientology.[1] After training on the ship, respondent was assigned to the Advance Organization in Los Angeles, where he became the director of disbursements. He later became the Flag Banking Officer.

Alan Boughton, Flag Banking Officer International, was respondent's superior. Only respondent and Boughton knew the combination of the safe kept in respondent's office. Respondent handled foreign currency, American cash, and various travelers' checks as part of his job.

In May or June, 1969, respondent told Boughton that he wanted to leave the Church. Boughton asked him to reconsider. Respondent wrote a memo and later a note; he spoke to the various executive officers. They told him that the only way he could get out of Sea Org was to go through "auditing" and to get direct permission from L. Ron Hubbard. Respondent wrote to Hubbard. A chaplain of the Church came to see him. Lawrence Krieger, the highest ranking justice official of the Church in California, told respondent that if he left without permission, he would be fair game and "You know we'll come and find you and we'll bring you back, and we'll deal with you in whatever way is necessary."

On the night of June 7 or early morning of June 8, 1969, respondent went to his office at the Church of Scientology and took several documents from the safe. These documents were taken by him to the Internal Revenue Service in Kansas City; he used them to allege improper

[1] One such policy, to be enforced against "enemies" or "suppressive persons" was that formerly titled "fair game." That person "[m]ay be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed." (Exhibit 1.)

changes in the records of the Church. He denies that any Swiss francs were in the safe that night or that he took such Swiss francs. Furthermore, respondent denies the allegation that he stole various travelers' checks from the safe. He admitted that some travelers' checks had his signature as an endorsement, but maintains that he deposited those checks into an open account of the Church of Scientology. There is independent evidence that tends to corroborate that statement. Respondent, having borrowed his roommate's car, drove to the airport and flew to Kansas City, where he turned over the documents to the Internal Revenue Service.

Respondent was arrested in Florida upon a charge of grand theft. Boughton had called the Los Angeles Police Department to report that $23,000 in Swiss francs was missing. Respondent was arrested in Florida; he waived extradition and was in jail for 21 days. Eventually, the charge was dismissed. The deputy district attorney in Los Angeles recommended a dismissal in the interests of justice.[2]

CONTENTIONS ON APPEAL:

1. Respondent's trial counsel engaged in flagrant misconduct throughout the proceedings below and thereby deprived appellant of a fair trial.

2. The verdict below was reached as a result of (a) counsel's ascription to appellant of a religious belief and practices it did not have and (b) the distortion and disparagement of its religious character, and was not based upon the merits of this case. To allow a judgment thereby

[2] Leonard J. Shaffer, the deputy district attorney, testified outside the presence of the jury that members of the Church were evasive in answering his questions. He testified that the reasons for the dismissal were set forth in his recommendation; the dismissal was not part of a plea bargain or procedural or jurisdictional issue.

achieved to stand would constitute a violation of appellant's free exercise of religion.

3. Respondent failed to prove that appellant maliciously prosecuted him and therefore the judgment notwithstanding the verdict should have been granted.

4. The refusal of the trial court to ask or permit voir dire questions of prospective jurors pertaining to their religious prejudices or attitudes deprived appellant of a fair trial.

5. It was prejudicial error to direct the jury, in its assessment of the malicious prosecution claim, to disregard evidence that respondent stole appellant's Australian and American Express travelers' checks.

6. The order of the trial court in denying to appellant discovery of the factual basis for the obtaining of a dismissal by the district attorney of the criminal case *People* v. *Allard* was an abuse of discretion and a new trial should be granted and proper discovery permitted.

7. Respondent presented insufficient evidence to support the award of $50,000 in compensatory damages which must have been awarded because of prejudice against appellant.

8. Respondent failed to establish corporate direction or ratification and also failed to establish knowing falsity and is therefore not entitled to any punitive damages.

9. Even if the award of punitive damages was proper in this case, the size of the instant reward, which would deprive appellant Church of more than 40% of its net worth, is grossly excessive on the facts of this case.

10. There was a lack of proper instruction regarding probable cause.[3]

---

[3] This issue is raised for the first time in appellant's reply brief.

DISCUSSION:

1. *There was no prejudicial misconduct by respondent's trial counsel, and appellant was not deprived of a fair trial.*

Appellant claims that it was denied a fair trial through the statements, questioning, and introduction of certain evidence by respondent's trial counsel. *Love* v. *Wolf*, 226 Cal.App.2d 378, is cited as authority.

We have reviewed the entire record and find appellant's contentions to be without merit. Several of counsel's individual statements and questions were inappropriate. However, there often were no objections by counsel for appellant where an objection and subsequent admonition would have cured any defect; or there was an objection, and the trial court judiciously admonished the jury to disregard the comment. Except for these minor and infrequent aberrations, the record reveals an exceptionally well-conducted and dispassionate trial based on the evidence presented.

As in *Stevens* v. *Parke, Davis & Co.*, 9 Cal.3d 51, 72, a motion for a new trial was made, based in part upon the alleged misconduct of opposing counsel at trial. What was said in *Stevens* applies to the instant case. " 'A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.' [Citation.] From our review of the instant record, we agree with the trial judge's assessment of the conduct of plaintiff's counsel and for the reasons stated above, we are of the opinion that defendant has failed to demonstrate prejudicial misconduct on the part of such counsel." (*Stevens* v. *Parke, Davis & Co., supra*, 9 Cal.3d at p. 72.)

2. *The procedure and verdict below does not constitute a violation of appellant's First Amendment free exercise of religion.*

Appellant contends that various references to practices of the Church of Scientology were not supported by the evidence, were not legally relevant, and were unduly prejudicial. The claim is made that the trial became one of determining the validity of a religion rather than the commission of a tort.

The references to which appellant now objects were to such practices as "E-meters," tin cans used as E-meters, the creation of religious doctrine purportedly to "get" dissidents, and insinuations that the Church of Scientology was a great money making business rather than a religion.

The principal issue in this trial was one of credibility. If one believed defendant's witnesses, then there was indeed conversion by respondent. However, the opposite result, that reached by the jury, would naturally follow if one believed the evidence introduced by respondent. Appellant repeatedly argues that the introduction of the policy statements of the Church was prejudicial error. However, those policy statements went directly to the issue of credibility. Scientologists were allowed to trick, sue, lie to, or destroy "enemies." (Exhibit 1.) If, as he claims, respondent was considered to be an enemy, that policy was indeed relevant to the issues of this case. That evidence well supports the jury's implied conclusion that respondent had not taken the property of the Church, that he had merely attempted to leave the Church with the documents for the Internal Revenue Service, and that those witnesses who were Scientologists or had been Scientologists were following the policy of the Church and lying to, suing and attempting to destroy respondent. Evidence of such policy statements were damaging to appellant, but they were entirely relevant. They were not prejudicial. A party whose reprehensible acts are the cause of harm to another and the reason

for the lawsuit by the other cannot be heard to complain that its conduct is so bad that it should not be disclosed. The relevance of appellant's conduct far outweighs any claimed prejudice.[4]

We find the introduction of evidence of the policy statements and other peripheral mention of practices of the Church of Scientology not to be error. In the few instances where mention of religious practices may have been slightly less germane than the policy statements regarding fair game, they were nonetheless relevant and there was no prejudice to appellant by the introduction of such evidence.

3. *The trial court properly denied the motion for judgment notwithstanding the verdict.*

Appellant claimed that it had probable cause to file suit against respondent. The claim is made that even if Alan Boughton did take the checks from the safe, knowledge of that act should not be imputed to appellant Church.

Based on the policy statements of appellant that were introduced in evidence, a jury could infer that Boughton was within the scope of his employment when he stole the francs from the safe or lied about respondent's alleged theft. Inferences can be drawn that the Church, through its agents, was carrying out its own policy of fair game in its actions against respondent. Given that view of the evidence, which as a reviewing court we must accept, there is substantial evidence proving that appellant maliciously prosecuted respondent. Therefore, the trial court did not err in denying the motion for judgment notwithstanding the verdict.

---

[4] The trial court gave appellant almost the entire trial within which to produce evidence that the fair game policy had been repealed. Appellant failed to do so, and the trial court thereafter permitted the admission of Exhibit 1 into evidence.

4. *The trial court performed proper voir dire of prospective jurors.*

Appellant claims that the trial court refused to ask or permit voir dire questions of prospective jurors pertaining to their religious prejudices or attitudes. The record does not so indicate. Each juror was asked if he or she had any belief or feeling toward any of the parties that might be regarded as a bias or prejudice for or against any of them. Each juror was also asked if he or she had ever heard of the Church of Scientology. If the juror answered affirmatively, he or she was further questioned as to the extent of knowledge regarding Scientology and whether such knowledge would hinder the rendering of an impartial decision. One juror was excused when she explained that her husband is a clergyman and that she knows a couple that was split over the Church of Scientology.

The trial court's thorough questioning served the purpose of voir dire, which is to select a fair and impartial jury, not to educate the jurors or to determine the exercise of peremptory challenges. (*Rousseau* v. *West Coast House Movers*, 256 Cal.App.2d 878, 882.)

5. *It was not prejudicial error to direct the jury, in its assessment of the malicious prosecution claim, to disregard evidence that respondent stole appellant's Australian and American Express travelers' checks.*

Appellants submits that evidence of respondent's purported theft of the Australian and American Express travelers' checks should have been admitted as to the issue of malicious prosecution as well as the cross-complaint as to conversion. If there were any error in this regard, it could not possibly be prejudicial since the jury found for respondent on the cross-complaint. It is evident that the jury did not believe that respondent stole the travelers'

checks; therefore, there could be no prejudice to appellant by the court's ruling.

6. *Appellant suffered no prejudice by the trial court's denial of discovery of the factual basis for obtaining of the dismissal by the district attorney.*

Prior to trial, appellant apparently sought to discover the reasons underlying the dismissal of the criminal charges against respondent. This was relevant to the instant case since one of the elements of a cause of action for malicious prosecution is that the criminal prosecution against the plaintiff shall have been favorably terminated. (*Jaffe* v. *Stone*, 18 Cal.2d 146.)

Whether or not the lower court was justified in making such an order, the denial of discovery along these lines could not be prejudicial. During the trial, counsel for all parties stipulated that the criminal proceedings against Allard were terminated *in his favor* by a dismissal by a judge of that court upon the recommendation of the district attorney.

In addition, there was a hearing outside the presence of the jury in which the trial court inquired of the deputy district attorney as to the reasons for the dismissal. It was apparent at that time that the prospective witnesses for the Church of Scientology were considered to be evasive. There was no prejudice to appellant since the deputy district attorney was available at trial. Earlier knowledge of the information produced would not have helped defendant. We find no prejudicial error in the denial of this discovery motion.

7. *The award of $50,000 compensatory damages was proper.*

Appellant contends that based upon the evidence presented at trial, the compensatory damage award is excessive. In addition, appellant contends that the trial court

erred in not allowing appellant to introduce evidence of respondent's prior bad reputation.

There was some discussion at trial as to whether respondent was going to claim damaged reputation as part of general damages. The trial court's initial reaction was to allow evidence only of distress or emotional disturbance; in return for no evidence of damaged reputation, appellant would not be able to introduce evidence of prior bad reputation. The court, however, relying on the case of *Clay* v. *Lagiss*, 143 Cal.App.2d 441, held that lack of damage to reputation is not admissible. Therefore, respondent was allowed to claim damage to reputation without allowing appellant to introduce evidence of his prior bad reputation.

In matters of slander that are libelous per se, for example the charging of a crime, general damages have been presumed as a matter of law. (*Douglas* v. *Janis*, 43 Cal. App.3d 931, 940[4], citing *Clay* v. *Lagiss*, *supra*, 143 Cal. App.2d at p. 448. Compare *Gertz* v. *Welch*, 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997.)[5] Damages in malicious prosecution actions are similar to those in defamation. Therefore, damage to one's reputation can be presumed from a charge, such as that in the instant case that a person committed the crime of theft. In any event, as the

[5] The Supreme Court held in *Gertz* v. *Welch*, *supra*, 418 US 323, 41 L Ed 2d 789, 810, 94 S Ct 2997, an action for defamation, that "the States may not permit recovery of presumed or punitive damages, *at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" (Emphasis added.) The instant case is distinguishable from *Gertz*. Initially, the interests protected by a suit for malicious prosecution include misuse of the judicial system itself; a party should not be able to claim First Amendment protection maliciously to prosecute another person. Secondly, the jury in the instant case must have found "knowledge of falsity or reckless disregard for the truth" in order to award punitive damages herein. Therefore, even under *Gertz*, a finding of presumed damages is not unconstitutional.

trial court in the instant case noted, there was no offer of proof regarding respondent's prior bad reputation; any refusal to allow possible evidence on that subject has not been shown to be error, much less prejudicial error.

Appellant further contends that the amount of compensatory damages awarded was excessive and that the jury was improperly instructed regarding compensatory damages. The following modified version of BAJI 14.00 and 14.13 was given:

"If, under the court's instructions, you find that plaintiff is entitled to a verdict against defendant, you must then award plaintiff damages in an amount that will reasonably compensate him for each of the following elements of loss or harm, which in this case are presumed to flow from the defendant's conduct without any proof of such harm or loss: damage to reputation, humiliation and emotional distress.

"No definite standard or method of calculation is prescribed by law to fix reasonable compensation for these presumed elements of damage. Nor is the opinion if any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for damage to reputation, humiliation and emotional distress, you shall exercise your authority with calm and reasonable judgment, and the damages you find shall be just and reasonable."

The following instruction was requested by defendant and was rejected by the trial court:

"The amount of compensatory damages should compensate plaintiff for actual injury suffered. The law will not put the plaintiff in a better position than he would be in had the wrong not been done." Accompanying the request for that motion is a citation to *Staub* v. *Muller*, 7 Cal.

2d 221, and *Basin Oil Co. of Cal.* v. *Baash-Ross Tool Co.*, 125 Cal.App.2d 578.

The Supreme Court has recognized that "Damages potentially recoverable in a malicious prosecution action are substantial. They include out-of-pocket expenditures, such as attorney's and other legal fees . . .; business losses . . .; general harm to reputation, social standing and credit . . .; mental and bodily harm . . .; and exemplary damages where malice is shown. . . ." (*Babb* v. *Superior Court*, 3 Cal.3d 841, 848, fn. 4.) While these damages are compensable, it is the determination of the damages by the jury with which we are concerned. Appellant seems to contend that the jury must have actual evidence of the damages suffered and the monetary amount thereof.

"The determination of the jury on the issue of damages is conclusive on appeal unless the amount thereof is so grossly excessive that it can be reasonably imputed solely to passion or prejudice in the jury. [Citations.]" (*Douglas* v. *Janis*, *supra*, 43 Cal.App.3d at p. 940.) The presumed damage to respondent's reputation from an unfounded charge of theft, along with imprisonment for twenty-one days, and the mental and emotional anguish that must have followed are such that we cannot say that the jury's finding of $50,000 in compensatory damages is unjustified. That amount does not alone demonstrate that it was the result of passion and prejudice.

8. *Respondent is entitled to punitive damages.*

Appellant cites the general rule that although an employer may be held liable for an employee's tort under the doctrine of respondeat superior, ordinarily he cannot be made to pay any punitive damages where he neither authorized nor ratified the act. (4 Witkin, Summary of Calif. Law., 8th Ed., § 855, p. 3147.)[6] Appellant claims that

[6] We again note that *Gertz* v. *Welch*, *supra*, precludes the award of punitive damages in defamation actions "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." The facts of the instant case fall within that categorization, so a finding of punitive damages was proper. Moreover, as we noted above, an egregious case of malicious prosecution subjects the judicial system itself to abuse, thereby interfering with the constitutional rights of all litigants. Punitive damages may therefore be more easily justified in cases of malicious prosecution than in cases of defamation. The societal interests competing with First Amendment considerations are more compelling in the former case.

the Church of Scientology, which is the corporate defendant herein, never either authorized or ratified the malicious prosecution.

The finding of authorization may be based on many grounds in the instant case. For example, the fair game policy itself was initiated by L. Ron Hubbard, the founder and chief official in the Church. (Exhibit 1.) It was an official authorization to treat "enemies" in the manner in which respondent herein was treated by the Church of Scientology.

Furthermore, all the officials of the Church to whom respondent relayed his desire to leave were important managerial employees of the corporation. (See 4 Witkin, Summary of Calif. Law, 8th Ed., *supra*, § 857, p. 3148.)

The trier of fact certainly could have found authorization by the corporation of the act involved herein.

9. *The award of punitive damages.*

Any party whose tenets include lying and cheating in order to attack its "enemies" deserves the results of the risk which such conduct entails. On the other hand, this conduct may have so enraged the jury that an award of punitive damages may have been more the result of feelings of animosity, rather than a dispassionate determination of an amount necessary to assess defendant in order to deter it from similar conduct in the future. In our view

the disparity between the compensatory damages ($50,000) and the punitive damages ($250,000) suggests that animosity was the deciding factor. Our reading of the decisional authority compels us to conclude that we should reduce the punitive damages. We find $50,000 to be a reasonable amount to which the punitive damages should be reduced. We perceive this duty, and have so modified the punitive damages award not with any belief that a reviewing court more ably may perform it.[7] Simply stated the decisional authority seems to indicate that the reviewing court should examine punitive damages and where necessary modify the amount in order to do justice. (*Cunningham* v. *Simpson*, 1 Cal.3d 301; *Forte* v. *Nolfi*, 25 Cal. App. 3d 656; *Shroeder* v. *Auto Driveaway Company*, 11 Cal.3d 908; *Livesey* v. *Stock*, 208 Cal. 315, 322.)

10. *Instruction on probable cause.*

Appellant requested an instruction stating: "Where it is proven that a judge has had a preliminary hearing and determined that the facts and evidence show probable cause to believe the plaintiff guilty of the offense charged therefore, ordering the plaintiff to answer a criminal complaint, this is *prima facie* evidence of the existence of probable cause." The trial court gave the following instruction: "The fact that plaintiff was held to answer the charge of grand theft after a preliminary hearing is evidence tending to show that the initiator of the charge had probable cause. This fact is to be considered by you along with all the other evidence tending to show probable cause or the lack thereof."[8]

Appellant claimed for the first time in his reply brief that the trial court's lack of proper instruction regarding probable cause was prejudicial error. Since this issue was

[7] See dissent in *Cunningham* v. *Simpson*, 1 Cal.3d 301.

[8] This instruction was given on the court's own motion.

raised for the first time in appellant's reply brief, we decline to review the issue.[9]

The judgment is modified by reducing the award of punitive damages only, from $250,000 to the sum of $50,000. As modified the judgment is in all other respects affirmed.

Costs on appeal are awarded to respondent Allard.

CERTIFIED FOR PUBLICATION.

BEACH, J.

We concur:

ROTH, P. J.

FLEMING, J.

* * * * * *

APPEAL from judgment of the Superior Court of Los Angeles County. Parks Stillwell, Judge. Modified/Affirmed.

* * * * * *

Morgan, Wenzel & McNicholas, By: Gerald E. Agnew, Jr., Charles B. O'Reilly, for Plaintiff, Cross-Defendant and Respondent.

* * * * * *

Murchison, Cumming, Baker & Velpmen, By: Michael B. Lawler; Tobias C. Tolzmann, Joel Kreiner, for Defendant, Cross-Complainant and Appellant.

* * * * * *

[9] We note that given the circumstances of the instant case, the juror could have easily been misled by the requested instruction. If the evidence showed that the agents and employees of appellant were lying, then the preliminary hearing at which they also testified would not be valid. While the jurors may of course consider that the magistrate at the preliminary hearing found probable cause, that should be in no way conclusive in the jury's determination of probable cause.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

July 15, 1976

I have this day filed Order .....

HEARING DENIED

In re: 2 Civ. No. 45562

ALLARD

vs.

CHURCH OF SCIENTOLOGY OF CALIF.

Respectfully,

G. E. BISHEL
Clerk

40748-877- 3-76 3M OSP

APPENDIX C

Exhibit 1

Hubbard Communications Office
St. Hill Manor
East Grinstead, Sussex

HCO Policy Letter of 18 Oct. 1967

Issue IV

Penalties For Lower Conditions

(Applies both Orgs and Sea Org)

LIABILITY—Suspension of Pay and a dirty grey rag on left arm and day and night confinement to org premises.

TREASON—Suspension of pay, and deprivation of all uniforms, and insignia, a black mark on left cheek, and confinement on org premises or dismissal from post and debarment from premises.

DOUBT—Debarment from premises. Not to be employed.

Payment of fine amounting to any sum may have cost org.

Not to be trained or processed. Not to be communicated or argued with.

ENEMY—SP Order. Fair game. May be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed.

L. RON HUBBARD
Founder

APPENDIX D

Extracts from arguments of counsel in the trial court

". . . Now, I want to go to what the evidence is going to show about Scientology.

"This was an organization founded by one L. Ron Hubbard. Ron Hubbard ran Scientology with an iron fist. In approximately 1966, he stepped officially into the background when Scientology gained a stronghold in California. He then set up the California Church of Scientology as the stronghold for Scientology. Now, Mr. Hubbard then went to his fleet of ships and sailed around the world in his fleet of ships, preparing policy for the Church of Scientology of California.

"Now, one of these written directives, issued by one (R.T. 86) L. Ron Hubbard, mandated that all true Scientologists follow his policy to the letter. There was no room for discretion by any Scientologist. He prepared written directives that served as policy, and they were to follow that policy to the letter. Now, one of those policies was entitled, 'Fair Game,' the Church of Scientology fair game law. Now, this policy mandated that whenever any person performed a suppressive act, he became fair game. A suppressive act was defined as any act that could interfere with or impede Scientology. A suppressive act was even defined as a staff member failing to turn out the light in the office that night. These are in the form of written policy directives. Once you became a suppressive person for performing a suppressive act, the policy was as follows:

"This suppressive person is an enemy of the Church of Scientology. This suppressive person should be cheated, lied to, deceived. Lawsuits should be filed against this suppressive person. This suppressive person should be, it is stated, destroyed.

"Now, that is one of the policies of the Church of Scientology. Other policies, equally as despicable, will be introduced into evidence pertaining to their practices as it affected Mr. Allard.

"Now, I want to go back again to Mr. Allard. He was going into Sea Organization. Now, Sea Organization was the organization for the devotees of the Church of Scientology. Sea Organization was that august body that pledged allegiance, to the death, to the policies of the Church of Scientology. When you entered Sea Organization, you signed a contract for a (R.T. 87) million years that you would follow and enforce the policies of the Church of Scientology. Sea Organization training consisted of training on one of L. Ron Hubbard's ships. And while you were on one of those ships, you went over all the policies of the Church of Scientology until those policies became second nature to you, because as a Sea Org member, you had the duty, to the death, to enforce those policies. And once you became a Sea Org member, you cannot leave the Church of Scientology. If you attempted to, you perpetrated a suppressive act. You became fair game, systematic destruction. (R.T. 88).

"• • •

Following recitation of events and conversations attending Allard's announcement of intention to leave the Church, it was said that:

> ". . . . Then Mr. Gestapo came to see him, the enforcer, Larry Krieger, the highest ranking justice department official for the Church of Scientology. . . ." (R.T. 92).

After alluding to and quoting a deputy district attorney's recommendation that criminal charges against Allard be dismissed because essential witnesses were Scientologists, who impressed the deputy district attorney as evasive and noncommittal, counsel noted to the jury:

". . . . Which you will see is another policy of Scientology, to be evasive and noncommittal. If you are sued, or investigated, or inquired about, withhold information." (R.T. 96).

In closing:

"Now, initially, although there was evidence showing that the Church of Scientology received vast amounts of money for processing students through so-called auditing procedure on tin cans, this trial is not to bring Scientology to justice for that. This is not a holy was against Scientology for calling itself a church; for receiving these funds for this auditing procedure involving the tin cans—

"MR. LEVINE: Objection, Your Honor. That misstates the evidence. There is no evidence that the Church of Scientology calls itself a church for those purposes.

"THE COURT: This appears to me to be a negative way of saying something that counsel cannot say positively, and I think it is improper, and I would ask counsel not to pursue it. (R.T. 653).

"* * *

"This proceeding is to bring the Church of Scientology to justice for what it did to Mr. Allard. This procedure is to bring the Church of Scientology to justice for dealing, as its inventory and its stock-in-trade in terror. This is to bring them to justice for abiding by the policy of fair game, promulgated by the madman of the Mediterranean, the fanatic from Flag. This is a policy to bring them to justice; a procedure to bring them to justice for promulgating and following this policy.

"Enemy. Suppressive Person Order. Fair Game. May be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed.

"And this document, plaintiff's No. 1, is in evidence and it will be in the jury room for you to look at.

"Now, it's this policy that was applied to Mr. Allard, and it's this policy that's on trial in this lawsuit. Can they or can they not decide, unilaterally, that some dissident member like Mr. Allard is a suppressive person, and then start out to destroy his life?

"MR. LEVINE: Objection, Your Honor, misstates the (R.T. 654) evidence. There is no showing that this policy was applied to Mr. Allard, throughout the entire testimony of this trial.

"THE COURT: The objection is overruled.

"MR. O'REILLY: Now, also in evidence is another document pertaining to fair game. A perusal of this document will indicate to you, even how Adolph Hubbard felt about——

"MR. LEVINE: Objection, Your Honor. There is no Adolph Hubbard.

"THE COURT: I don't recall such a name.

"MR. O'REILLY: Did I say Adolph?

"THE COURT: You said Adolph. And, counsel, I am going to ask you please, sir, not to do this. This is not fair argument for you to indulge yourself, as you were doing at the moment, sir.

"MR. O'REILLY: Yes, Your Honor. I'm sorry, Your Honor.

"This is a policy letter emanating from Mr. Hubbard's flagship—one after this policy letter emanated from his flagship—and in this one, which is also in evidence, he states:

" 'The practice of declaring people FAIR GAME will cease. FAIR GAME may not appear on any Ethics Order. It causes bad public relations.

" 'This Policy Letter does not cancel any policy on the treatment or handling of a Suppressive Person.' "

"That is what he says in this document of October 1968. Destroy them as I told you in 1967, but let's not call (R.T. 655) it fair game anymore. . . ."

"• • •

"When you read those documents, you will see that fair game means exactly what it says. Anybody in Scientology can have a go at you, no matter how much crime is involved in their effort. You are deserving of no rights if you are a suppressive person. A suppressive person is one who commits an oppressive act——

"MR. LEVINE: Objection, Your Honor, misstates the testimony; misstates the policy as written.

"MR. O'REILLY: It's Mr. Boughton's testimony, Your Honor.

"THE COURT: Ladies and gentlemen, I am sure that none of these gentlemen here—none of these attorneys is going to purposely misstate the evidence to you. If one of them does, (R.T. 678) ignore it. You are the one who determines what the evidence showed, and if counsel inadvertently misstates it to you, just ignore what he said. (R.T. 679).

"• • •

". . . . The purpose of punitive damages is to punish the defendant for what he did. This is not an auto accident. This is a malicious prosecution. This is dealing in terror against one individual because he was dissident from the belief of the group, and the question is do you condone what the secret society did, or do you say you can't do that? You cannot apply fair game to a citizen. Mr. Hubbard, if you apply fair game to a citizen in the future, you are going to have a lot less money to count on your yacht. That is the purpose of punitive damages. . . . (R.T. 682)

"• • •

". . . . How do you tell Scientology and L. Ron Hubbard that they do not treat people in the future as they have done to Mr. Allard? They do not implement fair game, if they do, it's going to cost them enormously. As I indicated, you have the power to condone or to stop it. This, again, is not evidence on damages. This is, I suggest, one million dollars in cash off of Mr. Hubbard's boat will make him think a second time before he devises those malicious tactics to a citizen, just because that citizen happens to dissent from Scientology practices. (R.T. 683).

"• • •

"I would like to start out, or finish would be more accurate, ladies and gentlemen, by doing this. Now, apparently from Mr. Lawler's closing argument, he thinks the title of church attached to Scientology justifies everything. After all, they are a church. Now, according to the evidence that has been in this case, this church could more aptly be referred to as tin can alley, because all we have seen in this case is that (R.T. 710) they charge enormous fees for processing people through some tin can procedure. He further mentioned that it's a nonprofit corporation——

"THE COURT: Counsel, you asked me to strike that, and I did.

"MR. O'REILLY: I think—I thought I objected to the argument, Your Honor, on that ground.

"THE COURT: You did, and you asked me to strike the statement, and I did.

"MR. O'REILLY: Okay, Your Honor. Thank you. I'm sorry.

"Now, according to the evidence, and according to your duties as jurors, you should treat the defendant for what it is, a big thriving business run by a mad man. That is all the evidence shows it to be. That is all it is.

". . . There is one way to hurt L. Ron Hubbard, the Church of Scientology, and that is with money, because that's all he cares about——

"MR. LAWLER: Your Honor, I am going to object to the continued reference that L. Ron Hubbard and Church of Scientology were the same thing. (R.T. 711).

"MR. O'REILLY: There has been all kinds of evicdence ——

"MR. LEVINE: No evidence that he is a mad man.

"MR. O'REILLY: There has been all kinds of evicdence ——

"THE COURT: Just a moment. Just a moment, please. I trust that you ladies and gentlemen understand this is argument by advocates in the heat of a lawsuit. If you will just keep that in mind, there is no problem.

"Go ahead, Mr. O'Reilly." (R.T. 712).

APPENDIX E

Declaration of Eual R. Harrow

I, EUAL R. HARROW, DECLARE:

That I am a resident of the County of Los Angeles, State of California.

That I am employed by Lee J. Hinson in the capacity of an investigator—adjuster.

That on or about June 6, 1974, I was contacted by the attorneys for the CHURCH OF SCIENTOLOGY in regard to the L. GENE ALLARD v. CHURCH OF SCIENTOLOGY case which was recently tried in the Los Angeles Superior Court. At that time, I was requested to contact several jurors in order to elicit their reasons for arriving at the ultimate verdict in the above case.

That on or about June 8, 1974, I interviewed Thomas E. Allen and obtained a brief statement from him. A copy of which is attached hereto and marked as Exhibit A. In that statement, Mr. Allen testified as follows:

> "The amount of the verdict was by compromise starting first with close to one million dollars. We felt the CHURCH had plenty of money."

Mr. Allen further advised me that many of the jury, especially the women members, were concerned for their safety, and felt that the CHURCH may try to do something to the members of the jury.

That thereafter I contacted Mr. Robert P. Franke and was advised that he did not wish to get further involved and would not give a written statement. However, Mr. Franke further advised that the policy letter of the CHURCH had a great deal of influence on him, and that several members of the jury, including himself, were quite concerned as to what the CHURCH might do to them.

That after several efforts, I finally contacted Mr. Leland S. Hanson and was also advised that he would not give a written statement. Mr. Hanson further advised me that he was very much against the CHURCH OF SCIENTOLOGY and their doctrines, and stated that for 200 years, this country had struggled to make everyone equal and that the doctrine of the CHURCH was a huge step backwards. He further advised after the trial, that several of the jurors contemplated on asking for protection, since they felt something might happen to them, due to the doctrines of the CHURCH OF SCIENTOLOGY.

That this was a very difficult assignment and that everyone I interviewed felt that they were now "Fair Game."

I have interviewed jurors in the past, but this has been the most difficult group I have ever encountered, and it appeared that all the jurors were somewhat intimidated by the doctrine of the CHURCH OF SCIENTOLOGY.

I declare, under penalty of perjury, that the foregoing is true and correct and that if called to testify, I could do so in a like manner; that all facts set out above are of my own personal knowledge except for those items that express an opinion and those are set forth in good faith.

Executed this 26th day of JUNE 1974, at Los Angeles, California.

/s/ EUAL R. HARROW
Eual R. Harrow

APPENDIX F

Extracts From Petitioner's Opening and Reply Briefs in State Intermediate Court of Appeal and Petition to State Supreme Court.

Appellant's Opening Brief in Court of Appeal, Second Appellate District, State of California, pp. 52-56:

"Point II.

"THE VERDICT BELOW WAS REACHED AS A RESULT OF (A) COUNSEL'S ASCEIPTION TO APPELLANT OF RELIGIOUS BELIEFS AND PRACTICES IT DID NOT HAVE AND (B) THE DISTORTION AND DISPARAGEMENT OF ITS RELIGIOUS CHARACTER AND WAS NOT BASED UPON THE MERITS OF THE CASE. TO ALLOW A JUDGMENT THEREBY ACHIEVED WOULD CONSTITUTE A VIOLATION OF APPELLANT'S FREE EXERCISE OF RELIGION.

"• • •

"There are three independent ways in which Appellant's religious freedom was impaired by the proceedings below. The first was that the validity and attractiveness of the Church's religion was made an issue in the trial below and a basis for liability therein, despite its utter irrelevance to those proceedings. To take a person's property in an action in which the validity of its religion has been improperly injected into the proceedings is a denial of religious freedom under the First and Fourteenth Amendments to the Constitution of the United States. See *United States* v. *Ballard,* 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1943). A reviewing appellate court must not participate in the deprivation of such a fundamental Constitutional right.

"• • •

"Secondly, inadequate procedural safeguards were provided at the trial below to protect the First Amendment rights of Appellant. No effective protection restricted the

jury from reaching a verdict based substantially upon the inflammatory misrepresentations by Respondent's counsel of Appellant's religious practices and character. . . .

"* * *

"Thirdly, Appellant also submits that it has a demeaning and degrading effect on religious groups and their adherents—and intensifies religious divisiveness within the society—if courtrooms are permitted to be vehicles for the ridicule of particular religions. . . ."

Appellant's Reply Brief in Court of Appeal, Second Appellate District, State of California, pp. 1-3, 17:

"Respondent does not seriously dispute that the proceeding below, from beginning to end, had been successfully engineered by his trial counsel as a species of religious heresy inquest and *auto da fe,* the central point of inquiry in which was diverted from the operative facts as such to the relative validity and public (*i.e.,* jury) acceptability of the religious beliefs and doctrines espoused by the Appellant. On the contrary, Respondent openly boasts of his trial counsel's success in this regard and pursues the tack of passionate religious harangue even on this appeal. Nor does Respondent dispute that ordinarily trials of religious beliefs and doctrines have no place in American courtrooms.

"* * *

". . . . In a nutshell, as the same might (and perhaps will) be put in a petition for certiorari to the United States Supreme Court, the essential question is this:

> "In a civil action for malicious prosecution, may a state court, without doing violence to the defendant's right to the free exercise of religion under the First and Fourteenth Amendments, receive and entertain evidence and argument concerning the defendant's religious beliefs and doctrines as bearing on the question of malice?"

Petition for Hearing to the Supreme Court of the State of California, p. 2:

"The asserted errors sought to be reviewed, each apparent from the face of the Court of Appeal's opinion, are, as hereinafter more particularly appears, several and apparently diverse, but on careful analysis are seen to be all related to a single centrally basic question of law, as follows:

> "In a civil action for malicious prosecution, may a state court, without violating a defendant corporate Church's right to the free exercise of religion under the First and Fourteenth Amendments to the United States Constitution, receive and entertain purported evidence and argument concerning the Church's religious doctrines and tenets as bearing on issues of motivation and credibility, and thereupon uphold a jury verdict on the premise that the jury might well have found the Church's tenets to be so reprehensible as to have properly inferred that all persons who espouse or at any time espoused the Church's faith are spiritually disposed to commit perjury and/or torts of the sort alleged?"

Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

NO 76 523

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

CHURCH OF SCIENTOLOGY,

Petitioner

vs.

L GENE ALLARD,

Respondent

Respondent's Opposition and Response to Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division Two

JOHN P McNICHOLAS, a member of
MORGAN WENZEL & McNICHOLAS
1545 Wilshire Boulevard
Suite 800
Los Angeles, California 90017
(213) 483-1961

Attorneys for Respondent

J. GALLAGHER — Printed Briefs (714) 835-6522

TOPICAL INDEX

Statement of The Case 1

Statement of Facts 2

Argument 3

A. No New Issue Presented by Petitioner 3

1. Issue Resolved by California Court of Appeal's Decision 3

2. California Courts Are Not Strangers to Claims Similar to Petitioner's 5

3. First Amendment Privileges Not Unlimited 6

3(a). Court May Look Behind Tenets 11

3(b). Compelling State Interest Outweighs Tenet 13

Conclusion 14

BEST COPY AVAILABLE

TABLE OF AUTHORITIES

Cases

	Page
Boulden v Alexander 82 U S 131 (1972)	12
Cleveland v U S	
Davis v Beason. 133 U S 333 (1890	7
Gonzales v Archbishop. 280 U S 1	4
In re Bartha. (1976) 63 Cal App 3d 584	5
Jaffe v Stone (1941) 18 Cal 2d 146	7
Kreshik v St Nicholas Cathedral 363 U S 190	4, 12
Leary v U S 383 F 2d 851 (5th Cir 1967)	6
Murdock v City of Memphis. 20 Wall. 590 22 L Ed 429	3
People v Collins. (1969) 273 Cal App 2d 486. 78 Cal Rptr 151	5
People v Mitchell. (1966) 244 Cal App 2d 178 52 Cal Rptr 884	5
People v Simon 80 Cal App 675 252 P 758 (1927)	6
People v Woody 61 Cal 2d 716 (1964)	5 6
Presbyterian Church v Hull Church 393 U S 440	4 12
Pulvermacher v Los Angeles etc Com (1943) 61 Cal App 2d 704	7
Richter v Neilson. (1936) 11 Cal App 2d 503	7

U.S. v. Ballard,
322 U.S. 78 4
U.S. v. Kuch,
288 F. Supp. 439 (DC., Dist. of Col., 1968) 6
Watson v. Jones,
80 U.S. 679 ..... 4, 12
Wisconsin v. Yoder,
406 U.S. 205 (1972) 13

California Codes

Page
California Code of Civil Procedure §428.10 1
California Code of Civil Procedure §657 2
California Code of Civil Procedure §340(3) 7

NO. 76 523

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

CHURCH OF SCIENTOLOGY,

Petitioner

vs.

L. GENE ALLARD,

Respondent

Respondent's Opposition and Response to Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division Two

I
STATEMENT OF THE CASE

L. Gene Allard (hereinafter "Respondent") filed and prosecuted a civil action against The Church of Scientology of California (hereinafter "Petitioner") based on the tort of malicious prosecution. Petitioner cross-complained (**California Code of Civil Procedure, §428.10**) for conversion.

A jury trial commenced on May 21, 1974 and concluded by verdict on May 31, 1974.

On the malicious prosecution action the jury found in favor of Respondent and awarded Respondent $50,000.00 in compensatory damages and assessed $250,000.00 in punitive damages against Petitioner. On the cross-complaint for conversion, the jury also found in favor of Respondent and against Petitioner.

Notice of Entry of Judgment was filed by the Clerk of the Superior Court of the State of California, County of Los Angeles, on June 6, 1974.

Petitioner moved for a new trial on all statutory grounds (**California Code of Civil Procedure,** §657) and urged the same points and arguments raised in its Brief on Appeal to the California Court of Appeal, Second Appellate District (filed June, 1975). After oral argument the trial court denied Petitioner's Motion for New Trial.

The Petitioner noticed its Appeal to the California Court of Appeal, Second District, on August 16, 1974. The Court of Appeal modified and affirmed the lower court's verdict in its decision rendered May 18, 1976. The full text of that decision is Appendix "A" attached to Petitioner's papers.

Both Respondent and Petitioner petitioned the Court of Appeal for Rehearing. The requests were denied. Petition was made for a hearing before the Supreme Court of the State of California. This too was denied (Appendix "B", p. 16a of Petitioner's papers).

Petitioner has now petitioned this Honorable Court for a Writ of Certiorari based on jurisdiction under 28 USC, §1257(3).

II
STATEMENT OF FACTS

Respondent respectfully points out to this Court that the Statement of the case contained in Petitioner's Petition for a Writ of Certiorari (pages 3-11) contains argument.

Deleted of that argument, Respondent generally accepts the statement as a Statement of Facts of this matter.

Where discrepancy appears or where the court's attention needs to be directed to additional facts Respondent makes appropriate references and citations thereto in his Argument. **infra.**

[For purposes of brevity and convenience. referenced to Petitioner's "Petition for a Writ of Certiorari" will be abbreviated as "Petitioner's Brief" Respondent will utilize the exhibits in Petitioner's brief for reference All references thereto shall be to the page numbers and exhibit numbers in the Brief]

III
ARGUMENT

A NO NEW ISSUE PRESENTED BY PETITIONER

1 ISSUE RESOLVED BY CALIFORNIA COURT OF APPEAL'S DECISION

A familiar principle established by this Court is that it will decline to review a state court judgment which rests on independent and adequate state grounds. even where the judgment also decides federal questions **Murdock v. City of Memphis,** 20 Wall. 590. 22 L Ed 429

The Court of Appeal of the State of California (Second Appellate District Division Two) squarely addressed itself to Petitioner's arguments when the appeal was before that court. including federal constitutional questions presented to this Court (Petitoner's Brief. pages 1a-15a)

That Court dealt with and dismissed Petitioner's claim that its First Amendment rights were violated almost immediately The Court properly dealt with the question of the "Fair Game Policy" as an evidentiary question (P 6a-7a)

Petitioner has failed to point out to this Honorable Court that the "Fair Game Policy" was not introduced into evidence without first giving Petitioner ". . .almost the entire trial within which to produce evidence that the Fair Game Policy had been repealed. [Petitioner] failed to do so, and the trial court thereafter permitted the admission of Exhibit 1 into evidence." (Footnote 4, p. 7a. Exhibit 1 is attached as Exhibit C to Petitioner's Brief, p. 17a.).

The trial court properly admitted evidence of the Fair Game Policy solely as to the issue of malice. Respondent submits that this conditional admission of the Fair Game Policy as to malice, was not asking a trier of fact to determine the validity of the doctrine. Credibility, motive and malice are important issues in malicious prosecution matters. Viewing the Fair Game Policy, along with the other evidence introduced during the trial allowed the jury to determine that Petitioner acted with malice and intended to cause injury and harm to Respondent by bringing the criminal action. (Petitioner's Brief, p. 6a-7a).

Assuming, **in arguendo** that the Fair Game Policy is a religious tenet honestly believed in by the Petitioner and its members, the First Amendment does not mandate exclusion of the Fair Game Policy from evidence. See, **U.S. v. Ballard,** 322 U.S. 78; **Kreshik v. St. Nicholas Cathedral,** 363 U.S. 190; **Presbytarian Church v. Hull Church,** 393 U.S. 440; **Watson v. Jones,** 80 U.S. 679; **Gonzales v. Archbishop,** 280 U.S. 1.

2 CALIFORNIA COURTS ARE NOT STRANGERS TO CLAIMS SIMILAR TO PETITIONER'S

The courts in the State of California have many times been faced with questions regarding the First Amendment to the United States Constitution

In **People v. Woody,** 61 Cal 2d 716 (1964). the California Supreme Court reversed a criminal verdict against certain Navajo Indians prosecuted under an ordinance prohibiting unauthorized possession of peyote, on the grounds the defendants used the drug in a bona fide pursuit of a religious faith and did not frustrate a compelling interest of the state.

The court held that a trier of fact need inquire only into the question of whether the defendants' belief in Peyotism is honest and good faith, not the truth or validity of the religious beliefs. The court rejected the argument that the approach of the court required a case by case inquiry into the bona fides of particular defendant's beliefs

The Court stated the California test to be that a "state must show that a compelling state interest outweighs the defendant's interest in religious freedom " (G1 Cal 2d at 718)

Respondent submits that the case at bar demonstrates the compelling state interest of California outweighs the Petitioner's belief in religious freedom The acts of Petitioner in dealing with the Fair Game Policy were not done to promote religious beliefs. but rather to hurt and destroy Respondent after he was declared an "enemy" and "fair game" (See also **In re Bartha,** (1976) 63 Cal App 3d 584, (No violation to First Amendment dealing with fortune telling inviolation to municipal ordinance), **People v. Mitchell,** (1966) 244 Cal App 2d 176, 52 Cal Rptr 884, **People v. Collins,** (1969) 273 Cal App 2d 486, 78 Cal Rptr 151.)

3. FIRST AMENDMENT PRIVILEGES NOT UNLIMITED

Petitioner cites authority that in essence recites that evidence of a party's religious beliefs cannot be admitted "as bearing upon their credibilities or propensities" **People v. Simon,** 80 Cal App 675, 252 P 758 (1927) (p 12.)

However, this rule is applicable only when the evidence sough to be admitted has **no logical** relation to the issues in the case. In **People v. Simon,** supra, the court held that the prosecution engaged in prejudicial misconduct when he referred in a derogatory fashion to defendant's religious affiliation of the Jewish faith as bearing upon his propensity to commit arson with wilful intent to defraud his insurers.

Where the evidence relates to an out of court statement of a church which contains a directive to its members to act in a particular fashion, and substantive evidence demonstrates the church members propensity to follow the Church's written directive, then the evidence of the "policy" is relevant to whether the members did act pursuant to that policy and whether they had a particular state of mind.

It is of little or no difference that Petitioner characterized the "Fair Game Policy" as a religious tenet Courts have been willing to go behind so-called religious beliefs and practices to determine if they are merely masks to legitimate otherwise illegal or tortious activity (See, **People v. Woody,** 61 Cal 2d 716 (1964). **Leary v. U.S.** 383 F 2d 851 (5th Cir . 1967), and **U.S. v. Kuch,** 288 F Supp. 439 (DC., Dist of Col.. 1968))

Again assuming, **in argumendo** that the "Fair Game Policy" (Exhibit "C". p. 17a of Petitioner's Brfief) is a religious tenet, honestly believed in by defendants, the First Amendment to the Constitution of the United States, by and through the Fourteenth Amendment to the Constitution, would not and does not mandate exclusion of the evidence

This court has reiterated in a long series of decisions that the First Amendment privileges are not unlimited Respondent requests that the court consider the facts of this case when viewing the quotation of **Davis v. Beason** (133 U S 333 (1890)). below

Petitioner herein was sued in a civil action for malicious prosecution The California Code of Civil Procedure. provides for such an action (C.C.P . §340(3)). [1] Elements of malicious prosecution include

(1) the malicious prosecution of a criminal proceeding terminated in favor of plaintiff (Respondent herein) (**Jaffe v. Stone,** (1941) 18 Cal 2d 146);

(2) defendant (Petitioner) acted without probable cause (**Pulvermacher v. Los Angels etc., Com.** (1943) 61 Cal App 2d 704 and

(3) the act was done with malice (**Richter v. Neilson,** (1936) 11 Cal App 2d 503)

This court is requested to consider that the bringing of a criminal action without just or good cause at a minimum is against public policy The **Code of Civil Procedure** allows recourse for this wrongful "act". **supra.**

The Fair Game Policy on its face (Exhibit "C". p 17a of Petitioner's Brief) specifies that one "[m]ay be tricked. sued or lied to or destroyed" The policy authorizes and directs actions by Scientologists which are against public policy and against the law

1 CCC §340 states as relevant Within one year

3 An action for libel slander assault battery false imprisonment seduction of a person below the age of legal consent or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check or a check that bears a forged or unauthorized endorsement or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826 for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl

The **Davis** case discusses the laws of the United States and Idaho regarding polygamy This Court did not allow the circumvention of the law in the **Davis** case under the cloak and guise of religion Respondent submits that this court should not do so with the case at bar. **Davis v. Beason,** held (at 334-346):

> "The first amendment to the consitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, **not injurious to the equal rights of others,** and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in the religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. **It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.** With man's relations to

his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, **provided always the laws of society designed to secure its peace and prosperity, and the morals of its people, are not interfered with.** However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as property the subjects of punitive legislation . . . . Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

On this subject the observations of this court through the late Chief Justice Waite, in **Reynolds vs. U.S.**, are pertinent. 98 U.S. 145, 165, 166. In this case the defendant was indicted and convicted [for bigamy] . . . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead

husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary, because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances " **It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion'."** (Emphasis supplied)

Petitioner herein believes that it should be allowed to apply its "Fair Game Policy" without restriction because it is a "tenet" of its church This "tenet" includes falsely bringing lawsuits and criminal prosecution without justification against former members of the church This concept parallels the arguments of the petitioner in **Daivs,** supra

Malicious prosecution, although not always punished by criminal sanctions, is nevertheless against public policy and is a wrong that may be punished civilly. Respondent submits that Petitioner's "tenet" cannot be allowed without restriction for it promotes the violation of the law.

More recently, this Court has stated:

"The Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even where the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' **Braunfeld v. Brown,** 366 U.S. 599, 603, 81 S.Ct. 144, 1446, 6 L.Ed. 2d 563, The Conduct or actions so regulated have invariable posed some substantial threat to public safety, peace or order. See, e.g., **Reynolds v. U.S.** 98 U.S. 145, 25 L.Ed. 244; **Jacobson v. Massachusetts,** 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 2d 643; [Compulsory vaccination]; **Prince v. Mass.** 321 U.D. 158, 64 S.Ct. 438, 88 L.Ed 645; **Cleveland v. U.S.,** 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12." **Sherbert v. Verner,** (1963) 374 U.S. 398, 402.

(a). COURT MAY LOOK BEHIND TENETS

The Free Exercise Clause encompasses (1) freedom to believe and (2) freedom to act. The first is absolute, but the second is subject to reasonable regulation for the protection of society, subject to the protections of matters that are arbitrary and capricious. **Cantwell v. Connecticut** (1940) 310 U.S. 296. (See **Leary v. U.S.,** 383 F. 2d 851 (5th Cir. 1967), rev'd on other grounds 395 U.S. 6).

Authority cited by Petitioner illustrate only that civil courts' interference with the **internal** affairs of a religious organization is prohibited by the First Amendment Free Exercise Clause. **(Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,** 344 U.S 94 (1952))

For example, **Watson v. Jones,** 80 U.S. 679 (1972) dealth with the question of which of two competing church bodies was the "Walnut Street Presbyterian Church". The Court held that there was no violation of the establishment clause for religious organizations to use civil courts to decide disputes, particularly **property disputes,** as long as there is no involvement in determining ecclesiastical doctrines.

This Court held in **Boulden v. Alexander,** 82 U.S. 131 (1972) when faced with the question of which of two competing groups in the Baptist Church was the legal trustee and "true members" of the church that the Court could not decide the question of who ought to be members, nor the rights of the members, but it could inquire whether the excommunication by a particular group was the act of the church in the resolution of **property matters** only

Petitioner cites **Presbyterian Church v. Hull Church,** 393 U.S. 440 and other cases for the proposition that "the First and Fourteenth Amendments preclude civil judges and jurors from undertaking theological interpretation " (p. 17) The jury in the trial court was asked to determine whether general church actions were a "substantial abandonment" of Presbyterian doctrines and, if so, whether those doctrines were so central as to require the termination of a trust which was to remain in effect as long as the church followed the Presbyterian doctrines in existence at the creation of the trust

It is clear that Petitioner's "Fair Game Policy" needs no interpretations. It is not a church doctrine that need be deciphered. It is clear on its face and illegal as and when applied.

(b.) COMPELLING STATE INTEREST OUTWEIGHS TENET.

The Court faced this question in **Wisconsin v. Yoder,** 406 U.S. 205 (1972). Inquiry by the Court was made whether certain beliefs or practices by the Amish were "religious" and thus protected by the First Amendment, or whether the practices were merely a "way of life. . . based on purely secular considerations."

In deciding that Wisconsin's compulsory school-attendance statute as applied to the Amish violated the First Amendment rights of the children's parents, this Court could not find a compelling state interest present to override the religious practices of the Amish.

As the Court examines the facts at bar, it is instantly obvious that there is a compelling state interest involved. The State of California has seen fit to express as against public policy and the civil law, the allowance of unfounded and malicious prosecutions. To allow this practice, which is dictated by the Fair Game Policy, is to promote conjested courts and lawsuits and prosecution for illegal purposes. Respondent submits that the proper administration of the courts in the State of California, public policy and the interest of justice, are compelling state interests to defeat a claim of violation of the exercise clause and establishment clause of the First Amendment, as professed by Petitioner.

IV

CONCLUSION

Respondent respectfully submits that all issues raised by Petitioner were dealt with properly by the Court of Appeal in the State of California. There are no issues before this Honorable Court that have not been dealt with before, nor is there an issue that there has been a violation of the First and Fourteenth Amendments. Respondent submits that Petitioner's request for a Writ of Certiorari be denied.

Respectfully submitted,

JOHN P McNICHOLAS, a member of
MORGAN, WENZEL & McNICHOLAS
PROFESSIONAL CORPORATION
1545 Wilshire Boulevard, Ste 800
Los Angeles, California 90017

Attorneys for Respondent,
L GENE ALLARD

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California 92701.

On January 11, 1977 I served the within RESPONDENT'S OPPOSITION AND RESPONSE TO PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in three sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Court of Appel
Second Appellate District
3580 Wilshire, Room 301
Los Angeles, California 90010

Clerk of the Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, California

Tobias C. Tolzmann
Attorney at Law
5564 Kawaikui
Honolulu, Hawaii 96821

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 11, 1977, at Santa Ana, California.

JACK GALLAGHER